

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0393
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAMES ROBERT KENNEDY, JR.,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091997001

Honorable Terry L. Chandler, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Following a jury trial, appellant James Kennedy was convicted of four counts of sale and/or transfer of a dangerous drug. The trial court sentenced him to five years' imprisonment on each count, to run concurrently. On appeal, Kennedy argues the court erred by denying his motion for disclosure of the identity of a confidential informant. For the reasons that follow, we affirm.

Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). A confidential informant put an undercover police officer in contact with Kennedy. On four separate occasions in 2009, Kennedy sold methamphetamine to the officer in transactions for which the informant was not involved. After Kennedy was arrested, he was charged with multiple drug-related offenses. He was convicted and sentenced as above. This appeal followed.

Discussion

¶3 Kennedy asserts the “trial court erred in deciding not to reveal the confidential informant’s identity.” Before trial, Kennedy filed a motion requesting the court to order disclosure of the informant’s identity. He maintained the informant could provide testimony relevant to his entrapment defense, claiming he had no “predisposition” to sell methamphetamine and the informant put “pressure on him.”¹ The court allowed Kennedy to submit questions to the informant in order to provide a “full

¹Kennedy did not present an entrapment defense at trial.

opportunity to determine whether [the informant's testimony would] be helpful . . . to the defense.”² After reviewing an audio recording of the informant's answers to the questions, the court denied the motion concluding the answers were “not at all beneficial to” Kennedy and “the information [wa]s [not] necessary for the entrapment defense.”

¶4 We review for an abuse of discretion the trial court's ruling on a motion to compel disclosure of a confidential informant's identity. *See State v. Tuell*, 112 Ariz. 340, 342-43, 541 P.2d 1142, 1144-45 (1975). Generally, the state may withhold the identity of confidential informants. Ariz. R. Crim. P. 15.4(b)(2); *State v. Superior Court*, 147 Ariz. 615, 616, 712 P.2d 462, 463 (App. 1985). But, if “disclosure of the name is necessary or desirable to show the defendant's innocence or . . . nondisclosure would deprive [the] defendant of a fair trial then the privilege must give way.” *State v. Benge*, 110 Ariz. 473, 477, 520 P.2d 843, 847 (1974). The defendant bears the burden of demonstrating the informant is likely to have evidence bearing on the merits of the case and that nondisclosure of the informant's identity would deprive the defendant of a fair trial. *See State ex rel. Berger v. Superior Court*, 106 Ariz. 470, 473-74, 478 P.2d 94, 97-98 (1970).

¶5 Kennedy maintains he met his burden to demonstrate the informant's testimony was relevant to his entrapment defense and the trial court therefore should have granted his motion for disclosure. We disagree. In *State v. Grounds*, 128 Ariz. 14, 14-15, 623 P.2d 803, 803-04 (1981), our supreme court held a defendant must produce

²The questions were presented to the informant by a police contact in order to retain anonymity.

evidence in support of a request for disclosure of a confidential informant. The court specified such evidence could include “sworn affidavits, stipulated facts, depositions, and oral testimony.” *Grounds*, 128 Ariz. at 15, 623 P.2d at 804. In *State v. Robles*, 182 Ariz. 268, 271, 895 P.2d 1031, 1034 (App. 1995), a case factually similar to this one, we affirmed the trial court’s refusal to order disclosure reasoning that, “[a]s in *Grounds*, only counsel’s argument was presented in support of . . . disclosure.”

¶6 Citing *Grounds* and *Robles*, Kennedy acknowledges he was required to produce “more than arguments of counsel to support disclosure.” But he asserts his “counsel presented evidence that [the informant] had been involved in talking [him] into dealing.”³ We disagree that counsel’s description of the entrapment defense Kennedy intended to offer can be characterized as evidence. *See Grounds*, 128 Ariz. at 15, 623 P.2d at 804 (“Argument of counsel is not evidence.”). Contrary to Kennedy’s assertion, counsel offered only argument—and no evidence—in support of the disclosure request. Moreover, even if we were to view the informant’s recorded answers to Kennedy’s questions as stipulated facts, we agree with the trial court that the answers were of no use to Kennedy in meeting his burden. Accordingly, Kennedy failed to meet his burden to produce evidence supporting disclosure of the identity of the confidential informant. *See*

³Kennedy attempts to distinguish his case from *Grounds* by characterizing his trial counsel’s argument as a “proffer of evidence.” He asserts the court in *Grounds* “d[id] not mention whether [the] arguments of counsel contained a proffer of evidence” and therefore “did not rule out proffers” as fulfilling the requirement that the defendant produce evidence in support of disclosure. A proffer is a tender or offer of evidence. *Black’s Law Dictionary* 1246 (8th ed. 2004). Kennedy has provided no authority that counsel’s proffer of testimony is equivalent to sworn affidavits, depositions and oral testimony.

id. at 14-15, 623 P.2d at 803-04. The court did not abuse its discretion in denying the motion. *See Tuell*, 112 Ariz. at 342-43, 541 P.2d at 1144-45.

Disposition

¶7 We affirm the convictions and sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge